

# In Defense of the Damned

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It is better to risk saving a guilty person than to condemn an innocent one.  
Voltaire, *Zadig* Chapter 6

## I. INTRODUCTION

“Defense lawyers oughta be sent to prison along with their defendants,” disdainfully lectured one middle-aged court-watcher to another. I overheard this conversation as I stood anonymously in the corridors of Los Angeles’s downtown criminal courthouse. (It was years before the O.J. Simpson trial would make this building famous.) A fledgling public defender fresh out of law school, I was taken aback by the palpable anger my new vocation had evoked.<sup>1</sup>

These court-watchers were part of a political phenomenon of the era. They were a very loosely organized group of somewhat conservative older citizens who wanted to keep the court system, particularly the judges, aware that the public was watching them. Any deviation from the true path of law and order was to be recorded and potentially used when the deviating jurist sought re-election. They had very little in common with, nor any particular affection for, public defenders like me. They downright hated most criminal defense attorneys. As far as they were concerned, we were no better than anyone we chose to represent.

## II. WHO’S AFRAID OF ATTICUS FINCH?

Their attitude came as a surprise to me. I had grown up reading stories and watching television shows, plays, and movies about criminal trials. The depicted defenders in these stories were usually dedicated lawyers leading courageous lives. I still remember the first time I saw a young Abraham Lincoln demolishing the government’s case for murder in 1850s Illinois with his folksy cross-examination of an eyewitness.<sup>2</sup> I envied Clarence Darrow’s opportunity to defend the right of a small town high school educator to teach evolution in the Bible-belt of 1920s

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<sup>1</sup> See generally Stanley A. Goldman, *First Thing We Do, Let’s Kill All the [Defense] Lawyers*, 30 LOY. L.A. L. REV. 1 (1996).

<sup>2</sup> JOHN P. FRANK, *LINCOLN AS A LAWYER* 175–76 (1961); *People v. Armstrong*, CASS COUNTY, IL (1858) (Abraham Lincoln’s legendary and successful defense of alleged killer William “Duff” Armstrong); *YOUNG MR. LINCOLN* (Twentieth Century Fox 1939) (The defendant was renamed Matt Clay for the motion picture.).

Tennessee.<sup>3</sup> Each of these acts and the lawyers who performed them seemed to me like Captain Kirk in a courtroom, and apparently I was not, and am still not, alone.

When, a generation later, the American Film Institute (AFI) named its hundred greatest motion picture heroes of all time, number one on the list was neither Rambo nor the vigilante of the *Death Wish* movies, nor was it Indiana Jones or even Han Solo. No crime fighter or superhero, but rather Atticus Finch, actor Gregory Peck's re-creation of Harper Lee's defense attorney father in *To Kill a Mockingbird*, was voted the greatest motion picture hero of all time.<sup>4</sup> How could you not admire this single parent, waging a seemingly hopeless battle to save, from both lynch mob and all white jury, a black man falsely accused of raping a white woman in Depression era Alabama?<sup>5</sup> (Apparently not all of our heroes were cowboys.)

What could possibly have led my court-watchers to believe that Atticus Finch and his fellow advocates were doing the Devil's work? Had they neither read nor seen any of the same books or movies I had? Of course they had. Their problem with my new calling was a more particular one: Abe Lincoln, Atticus Finch, and Perry Mason were never shown representing anyone who was actually guilty.

From a purely theatrical point of view this is explicable. Successfully freeing an innocent person would seem to be a more inspiring and dramatic outcome than would be the successful defending of the guilty. In fact, the typical portrayal of a criminal defense attorney representing the guilty is far different than the depiction of those representing the innocent. If movies and television are to be believable, it would appear that there is nothing worse that can befall a lawyer than discovering that he was appearing on behalf of a real criminal.

In the motion picture . . . *And Justice for All*, the protagonist played by Al Pacino is manipulated into taking on the case of someone who is very guilty and whom he would rather not represent. As his final act of rebellion against this conspiracy of injustice, he adamantly proclaims his client's guilt in his opening statement to the jury. Even though this act, which happens to be a violation of the canons of legal ethics, has probably cost him his license to practice law, the audience is made to understand the completely justifiable and moral nature of his indignation and the need for his self-sacrifice.<sup>6</sup>

The long-running television series *Matlock* provides us with another case in point.<sup>7</sup> The title character, a kind, folksy, older version of Perry Mason, has never lost a case and never defended anyone who was not innocent—except once. During one episode, Matlock realizes, to his shock, that his client actually did it.

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<sup>3</sup> See JEROME LAWRENCE & ROBERT E. LEE, *INHERIT THE WIND* (1955).

<sup>4</sup> AFI.com, *AFI's 100 Years . . . 100 Heroes & Villains*, <http://www.afi.com/tvevents/100years/handv.aspx> (last visited Mar. 1, 2008).

<sup>5</sup> See HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

<sup>6</sup> *AND JUSTICE FOR ALL* (Columbia Pictures 1979).

<sup>7</sup> *Matlock: The Best Friend* (NBC television broadcast Dec. 8, 1987).

He is, in fact, defending a murderer. Since he would never knowingly use his enormous talents to benefit the guilty, he chooses simply to lose the case. By pretending to place the blame for the defendant's crime on someone she loves, our hero successfully maneuvers his own client into confessing her guilt in open court. As the program comes to a close, the defeated lawyer is consoled by those who feel terrible for him. He has lost a case. He feigns regret, but the audience knows the truth. He was willing to see his reputation diminished rather than help a murderer go free.

In the popular feature film *The Devil's Advocate*, the head of a powerful law firm turns out to be the Devil himself, while his ambitious young associate is the spawn of Satan. How does the Devil know that his son, oblivious to his parenthood, is ready to take over the family business? That's easy. The young demon is being trained as a criminal defense attorney who helps guilty men to go free. It is at this moment that his father invites him to join the firm. Once he discovers his hellish fate, how does the unwilling young heir to the domain of the Inferno save himself? He returns in time to the scene of his worst crime, the helping of a guilty man escape his just desert, and withdraws from the case just in time to save his immortal soul.<sup>8</sup>

Once again, we are reminded for the umpteenth time that the guilty deserve no defense. The message is clear: Representing those who have actually committed crimes is a sin and should itself be a crime. In the real world, however, criminal defense attorneys spend most of their time representing either those who probably are guilty or whose innocence will never be definitively established. In failing to depict what actually constitutes a significant portion of the real-life justice system, the mass media is affecting public perceptions as well as missing out on a lot of good stories.

### III. GUILT BY INTUITION<sup>9</sup>

In the eyes of my hallway critics, in order to do the right, moral, and legal thing, defense attorneys had a simple duty: guarantee the public that they would represent only the innocent. How difficult could that really be? They, like movies or television, saw "truth" as something tangible, understandable, and clearly identifiable. They rarely, if ever, had any doubts. They appeared utterly convinced of the ease with which the absolute truth of guilt could be divined, as well as how simple it must be to disregard any of those annoying facts which might suggest a chance of innocence to someone less clear thinking than themselves.

With deference to their point of view, it does remind me of the advice given by a network executive in the penultimate episode of *The Larry Sanders Show*. He

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<sup>8</sup> THE DEVIL'S ADVOCATE (Warner Bros. Pictures 1997).

<sup>9</sup> Stanley A. Goldman, *Guilt by Intuition: The Insufficiency of Prior Inconsistent Statements to Convict*, 65 N.C. L. REV. 1 (1986).

instructed his late night talk show host that since the audience was not laughing at every joke the comic would tell in his live nightly monologue, it would be better to only tell the “funny ones.”<sup>10</sup> (A childlike faith in the precognitive powers of others is rarely justified and not always endearing.)

Were the ethics of my profession misguided in mandating that defense attorneys resolve plausible factual doubts in favor of their client? Was I wrong in believing so much of perception and evaluation, and even more so prediction, subject to some doubt? How exactly did my court-watchers suggest how I was supposed to decide, in advance of or even after trial, which defendants had or had not done it; and as a result decline, in part or whole, the role of zealous advocate?

#### IV. A MODEST PROPOSAL<sup>11</sup>

If the law mandated, or even permitted, an advocate’s pre-verdict conclusions about guilt as a condition precedent to zealous representation, what standard should be applied? What would have to be the level of my doubt before I could feel comfortable taking on a case or arguing for acquittal? Perhaps I was to think of myself as just another member of the jury, reaching a decision on my client’s guilt or innocence before performing accordingly.

Presumably, under such a modified scheme, if I truly believed my client to be innocent, I would be allowed to provide him with the benefits of a full heartfelt defense. If, on the other hand, I was not quite certain, perhaps I would only be permitted to impart to the jury a few innocence-angled suggestions. Nothing too elaborate or vigorous, of course; after all, the accused may actually have done it and I would have to be cautious in my advocacy so as not to risk misleading a jury into releasing a criminal. What if I was persuaded that my client actually had perpetrated the villainy with which he was charged? Well, no defense for him! In fact, I suppose I would have to give serious consideration to simply conceding guilt during my opening statement. (No point in waiting until the closing argument; I would be wasting so much of everybody’s time, not to mention the taxpayer’s money.)

If the system allowed for defenders to substitute their own judgment for that of the jury, then perhaps peremptory challenges and challenges for cause should be extended to the selection of defense attorneys as well as jurors. Perhaps defendants under such a system would be provided with a panel of perspective lawyers and the right to question them on their prejudices and attitudes about the crime and the accused. Only after an intensive process of questioning would the actual trial attorney be selected. Of course, this would mean that defendants might first need the assistance of a lawyer in order to select the defender who would

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<sup>10</sup> *The Larry Sanders Show: Putting the “Gay” Back in Litigation* (HBO television broadcast May 17, 1998).

<sup>11</sup> Jonathan Swift, *A Modest Proposal*, in *A MODEST PROPOSAL AND OTHER SATIRICAL WORKS* (1996) (1729).

actually be trying their case. If so, would this mean that the lawyer helping to select trial counsel should similarly be permitted or even required to allow his or her opinion of the guilt or innocence of the accused to influence whether to select a competent or incompetent trial attorney? Like mirrors reflecting within mirrors, how far back would this be taken?

Finally, in constructing any scheme under which attorneys are to be affected by their own judgment as to their client's guilt it must be remembered that I, and those of my ilk, were not witnesses to the crime itself, but are dependent on the reports of others. As difficult as it may have been for my court-watchers to believe, witnesses have been known to lie. Coincidences do sometimes occur, and much circumstantial evidence is subject to alternative explanations. Perhaps most importantly of all, the infallibility of eyewitnesses turns out to be far more chimerical than palpable.

#### V. DISTORTED VISION<sup>12</sup>

While 75,000 people each year become criminal defendants as a result of eyewitnesses,<sup>13</sup> "[e]yewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in seventy-five percent of convictions overturned through DNA testing."<sup>14</sup> What makes such evidence so subversively dangerous is that, in spite of decades of research showing its fallibility, jurors as well as judges still grant it an unwarranted degree of trustworthiness.<sup>15</sup> One recent survey revealed that 46% of potential jurors in the District of Columbia believed that when a witness testifies to their memory of a traumatic event they were in effect "narrating a video of the event [they could] see in [their] mind's eye."<sup>16</sup> That is simply not the way it works. Perhaps even more

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<sup>12</sup> Stanley A. Goldman, *Distorted Vision: Spontaneous Exclamations as a "Firmly Rooted" Exception to the Hearsay Rule*, 23 LOY. L.A. L. REV. 453 (1990).

<sup>13</sup> Press Release, Nat'l Sci. Found. False Identification: New Research Seeks to Inoculate Eyewitnesses Against Errors (Jan. 3, 1997), [http://www.nsf.gov/news/news\\_summ.jsp?cntn\\_id=101831](http://www.nsf.gov/news/news_summ.jsp?cntn_id=101831); see also Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177, 178 (2006).

<sup>14</sup> See The Innocence Project, *Understand the Causes: Eyewitness Misidentification*, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Mar. 1, 2008).

<sup>15</sup> See also Margery Malkin Koosed, *The Proposed Innocence Protection Act Won't—Unless It Also Curbs Mistaken Eyewitness Identification*, 63 OHIO ST. L.J. 263, 276 (2002); Jennifer L. Overbeck, *Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in the Federal Courts*, 80 N.Y.U. L. REV. 1895, 1897–98 (2005).

<sup>16</sup> Press Release, Nat'l Sci. Found. False Identification: New Research Seeks to Inoculate Eyewitnesses Against Errors (Jan. 3, 1997), [http://www.nsf.gov/news/news\\_summ.jsp?cntn\\_id=101831](http://www.nsf.gov/news/news_summ.jsp?cntn_id=101831); see also Richard S. Schmechel et al., *Beyond the Ken? Testing Juror's Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177 (2006).

disturbing, a survey showed that a significant percentage of judges may not understand what factors were important in judging the credibility of eyewitnesses.<sup>17</sup>

These misunderstandings may be a consequence of the counterintuitive nature of what studies have shown to be true. Police officers, for example, have been shown to have no greater skill in making identifications than lay witnesses;<sup>18</sup> the more traumatic the event witnessed, the *less* reliable the memory of it;<sup>19</sup> and the level of confidence a witness expresses in the certainty of their identification is all but irrelevant to its accuracy.<sup>20</sup>

## VI. NOT ALWAYS GOOD FOR THE SOUL

The popular impression that attorneys know their clients did it because guilty ones confessed to their lawyers is simply a “dramatic device” created by television (translation: nonsense). Even those who had confessed to the police often protest their innocence to counsel; and, perhaps most difficult of all for many to comprehend, even their admissions to the police come with no guarantees of reliability.

“In more than 25% of DNA exoneration cases, innocent defendants made incriminating statements, delivered outright confessions or pled guilty. These cases show that confessions are not always prompted by internal knowledge or actual guilt, but are sometimes motivated by external influences.”<sup>21</sup> The causes include coercion, misunderstanding, and various forms of mental disability.<sup>22</sup>

In how many of these cases did the defense attorneys believe that they were representing a guilty person? For those of us who find it almost inconceivable that anyone would confess to a crime they did not commit, it must be remembered that five hundred men confessed to the single Black Dahlia murder.<sup>23</sup>

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<sup>17</sup> Richard A. Wise & Martin A. Safer, *A Survey of Judges' Knowledge and Beliefs about Eyewitness Testimony*, 40 CT. REV. 6 (2003).

<sup>18</sup> Elizabeth F. Loftus, *Eyewitnesses: Essential but Unreliable*, PSYCHOL. TODAY, Feb. 1984, at 22, 24.

<sup>19</sup> See Robert Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432, 437–38 (1928).

<sup>20</sup> Brian L. Cutler et. al., *The Reliability of Eyewitness Identification: The Role of System and Estimator Variables*, 11 LAW & HUM. BEHAV. 233, 233–36 (1987).

<sup>21</sup> See The Innocence Project, *Understand the Causes: False Confessions*, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Mar. 1, 2008).

<sup>22</sup> *Id.*

<sup>23</sup> Miles Corwin, *False Confessions and Tips Still Flow in Simpson Case*, L.A. TIMES, Mar. 25, 1996, at A14. (I've always doubted whether more than 200 of those men who confessed were being entirely truthful.).

## VII. FADING PARCHMENT?

Perhaps after all there is good reason why “judge, jury, and executioner” are not listed in the job description of defense attorneys. Surely it could not be difficult to explain to these court-watchers, and those of like mind, the vital societal function served by a defense. As a public defender, it was my job to accept appointment to zealously represent any client with whom I had no legal or ethical conflict. My own personal opinion as to whether my client was or was not guilty was not supposed to affect my handling of the case, in part because I might be as wrong as everyone else in believing the accused culpable.

There are certainly alternative schemes, including restraining the advocacy of the defense, which would impose fewer hurdles for the government to overcome. These changes would likely ensure that more criminals received their just deserts, with the commensurate upside that society would not suffer as much future harm at the hands of these wrongdoers. The downside of these changes, however, would be the conviction of a greater number of the innocent who, in the absence of a vigorous defense, might not succeed in rightly challenging the government's case. All societies must make a choice. Do we err on the side of freeing the guilty or punishing the blameless?

Under our all but ancient formulation the answer was clear.<sup>24</sup> The guilty who go free may commit future harm; but the harm caused to the innocent accused that is wrongfully punished is a certainty because it has already occurred. (In addition, of course, every time an innocent is convicted the true perpetrator remains free to wreak whatever havoc he or she might.) No system can ever reach ideal justice.

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<sup>24</sup> The understanding of the need for defending even those who counsel believes to be guilty is actually an ancient one. In his treatise *ON DUTIES*, Cicero explains his willingness to defend the guilty, which he found far more honorable than (what he described as) the inhumane act of potentially prosecuting the innocent. CICERO, *ON DUTIES*, translated in CICERO, *ON THE GOOD LIFE* 147 (Michael Grant trans., 1971). See generally Michael Grant, *Introduction* to CICERO, *MURDER TRIALS* 19 (1990).

There is no need . . . to have any scruples about occasionally defending a person who was guilty . . . . For popular sentiment requires this; it is sanctioned by custom, and conforms with human decency.

The judge's business, in every trial, is to discover the truth. As for counsel, however, he may on occasion have to base his advocacy on points which look like the truth, even if they do not correspond with it exactly. . . .

The greatest renown, the profoundest gratitude, is won by speeches defending people. These considerations particularly apply when, as sometimes happens the defendant is evidently the victim of oppression and persecution at the hands of some powerful and formidable personage. That is the sort of case I have often taken on.

CICERO, *ON DUTIES*, *supra*, at 147. In fact, after defending a member of an ancient Italian family (Aulus Cluentius Habitus) on the charge of killing the defendant's own stepfather, Cicero bragged that he had “thrown dust in the eyes of the jury.” QUINTILLIAN, *INSTITUTO ORATORIA*, bk. II, ch. XVII, 17, 21 (H.E. Butler trans., 1920). Even Cicero, however, was hesitant to publicize his willingness to defend the guilty. About such beliefs he commented to a friend; “I must confess I should not have had the nerve to be saying such things . . . in a philosophical treatise.” CICERO, *ON DUTIES*, *supra*, at 147.

Our goal of providing effective representation for all defendants is quite simply, like Churchill's oft-quoted homage to democracy itself, the worst system with the exception of all the others.<sup>25</sup>

#### VIII. THE DEFENSE RESTS

This is not to suggest that criminal defense lawyers, even some of long experience, may not have some misgivings when they are successful in obtaining the acquittal of someone they believe to be guilty. Though without a doubt, my own favorite articulation of how little significance a client's possible guilt should play in the performance of a defense counsel was provided by author John Mortimer's self proclaimed "Old Bailey Hack," Horace Rumpole.

After successfully defending an unjustly accused high-ranking police official who had always been outspoken in his criticism of the tactics used by criminal defense attorneys to obtain acquittals for their obviously guilty clients, the two met for the following conversation as later recalled by the prickly barrister:

"I suppose you should thank me, the shifty old defense hack . . . . We doubtful characters managed to save your skin, Commander, and managed to tip the Scales of Justice in favor of the defense."

"I shall go on protesting about that, of course."

"I thought you might."

"Not that I have any criticism of what you did in my case. I'm sure you acted perfectly properly. You believed in my innocence."

"No." I had to say it . . . .

"You didn't believe in my innocence?"

"My belief is suspended. It's been left hanging up in the robbing room for years. It's not my job to find you innocent or guilty. That's up to the Jury. All I can do is put on your case as you would if you had," and I said it in all modesty, "anything approaching my ability."<sup>26</sup>

I can go further. As far as I was concerned, my job as a public defender probably was, for the most part, to defend the guilty. As Professor Alan Dershowitz chose to say: "[T]he vast majority of defendants brought to trial on

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<sup>25</sup> "Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time." Winston Churchill, Address in the House of Commons (Nov. 11, 1947).

<sup>26</sup> JOHN MORTIMER, *Rumpole and the Scales of Justice*, in RUMPOLE AND THE PRIMROSE PATH 98-99 (2004). Rumpole's sentiments are an amusing articulation of well established English traditions. Sir Patrick Hastings wrote that in "[a]ny criminal trial, the prisoner is entitled to be represented whether he be innocent or guilty, and the question of his innocence or guilt is no concern of the advocate who appears for him. . . . [H]is duty is to place before the court, with absolute honesty and to the best of his ability, the defense which the prisoner desires to raise." SIR PATRICK HASTINGS, CASES IN COURT 327 (1949).



criminal charges in America are, in fact, guilty. Thank God for that! Would anyone want to live in a country where the majority of people charged with crimes were innocent?"<sup>27</sup>

I knew a high school science teacher who quit his job to try his hand at acting. He primarily subsisted on what he could earn appearing in television commercials. If asked what he did for a living, he would perceptively respond that his job was to "audition." He did, in fact, audition, sometimes several times a week (without any compensation, of course). Every now and then (like a roulette player whose number occasionally comes up) he would be cast in a commercial, thus earning an actual (sometimes handsome) paycheck.

I saw my job, as a public defender, the same. I represented lots of possibly or even probably guilty clients for a living, and now and then I would find myself rewarded (or perhaps it would be more accurate to say *burdened*) by the responsibility of defending an innocent one.

In fact, the exact number of seemingly guilty defendants, who have not in fact committed the crimes of which they were charged, is something we will never know. The reality is that every defense attorney who has practiced long enough has probably believed a client to be guilty, only to discover at some point, after investigating or even during or after the trial itself, that he or she is actually representing an innocent person. I know I did.

#### IX. THE DOUBLE HELIX

Unfortunately, post-conviction DNA tests of the past several years have shown us that the actual number of wrongfully convicted are more numerous than many, myself included, had supposed. In spite of the panoply of constitutional protection, an uncomfortably large number of the innocent have been and apparently are still being convicted.

In spite of this, President George Bush adamantly maintained that there is no evidence that a single innocent person was executed in his home state of Texas while he was governor.<sup>28</sup> In 1999, he was so convinced in the accuracy of the Texas judicial system that, the same week he announced his candidacy for President, he vetoed a reform bill aimed at providing statewide standards and oversight for legal services provided indigent defendants.<sup>29</sup>

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<sup>27</sup> ALAN M. DERSHOWITZ, *THE VANISHING AMERICAN JEW: IN SEARCH OF JEWISH IDENTITY FOR THE NEXT CENTURY* 304 (1998).

<sup>28</sup> Steve Mills & Douglas Holt, *Both Sides Keep Fighting as Execution Day Arrives: Texas Gov. Bush Gets Case that Embodies Death Penalty Debate*, CHI. TRIB., June 22, 2000, at 1. "'As far as I'm concerned there has not been one innocent person executed since I've become governor,' Bush said in Los Angeles. 'We don't need a moratorium. I'm going to continue to uphold the laws of the land. I believe the system is fair and just.'" *Id.*

<sup>29</sup> In 2001, with President Bush residing in the White House and not the Governor's mansion, landmark Texas legislation on the subject known as the Texas Fair Defense Act was eventually

We can all hope the President is right and that no innocent has been executed there or anywhere else in America; however, what we do know is that there have been innocent people wrongly convicted of very serious crimes all over the United States. In the quarter century after the death penalty was reinstated in 1976, ninety-six people (more than one percent of those actually sentenced to death) "have been exonerated after spending years in prison or on death row for crimes they did not commit. Eighty-two of these people, including ten on death row, were proven innocent by post-conviction DNA testing."<sup>30</sup>

At the end of 2007, DNA testing had exonerated over 200 convicted people in some thirty-two states.<sup>31</sup> It seems appropriate to note that the Lone Star State appears to be far from immune to this problem.<sup>32</sup> In fact, revelations about the Dallas, Texas justice system could fill a treatise dedicated to the conviction of the innocent. In that one county alone, DNA testing has proven the innocence of at least thirteen wrongfully convicted and imprisoned men. In addition, hundreds of other Dallas cases are presently under review by the Innocence Project of Texas in cooperation with the Dallas District Attorney's Office.<sup>33</sup>

The Innocence Project at the Cardozo School of Law documented that in the United States during 2003 and through most of 2004, twenty-nine defendants, who had served a total of over 450 years in prison for crimes they had not committed, were exonerated by the results of tests not used or available at the time of their convictions. One is forced to ask the inconvenient question as to how many others have been and will be wrongfully convicted of crimes for which no potentially exonerating DNA testing is possible.<sup>34</sup>

Would the number of wrongfully convicted be even higher if we instituted major changes to weaken the role of the defense advocate? It is already well documented that the quality of advocacy provided for indigent defendants is scandalously low.<sup>35</sup> It seems that one does not have to travel to Iran, Cuba, China,

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passed into law. See Amy Bach, *Justice on the Cheap: For Many Indigent Defendants, the Right to a Lawyer Doesn't Mean Much*, NATION, May 21, 2001, at 25.

<sup>30</sup> Rochelle L. Haller, *The Innocence Protection Act: Why Federal Measures Requiring Post-Conviction DNA Testing and Preservation of Evidence are Needed in Order to Reduce the Risk of Wrongful Executions*, 18 N.Y.L. SCH. J. HUM. RTS. 101, 101-02 (2001). See generally David DeFoore, *Post-Conviction DNA Testing: A Cry for Justice from the Wrongly Convicted*, 33 TEX. TECH L. REV. 491, 493 (2002).

<sup>31</sup> See The Innocence Project, <http://www.innocenceproject.com> (last visited Nov. 8, 2007).

<sup>32</sup> In 2004, two Texas men, Brandon Moon and Josiah Sutton, were exonerated of crimes for which the two had served a total of over 20 years. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 50 (2004) [hereinafter BROKEN PROMISE].

<sup>33</sup> Press Release, Innocence Project, *James Waller Exonerated Through Pardon from Governor: One of 13 Dallas Men Proven Innocent by DNA Testing* (Mar. 9, 2007), <http://www.innocenceproject.org/Content/442.php#>.

<sup>34</sup> BROKEN PROMISE, *supra* note 32, at 50.

<sup>35</sup> See, BROKEN PROMISE, *supra* note 32 (analyzing extensive expert testimony on the delivery of indigent defense services in various jurisdictions).

Guantánamo Bay or back in time to the old Soviet Union in order to find examples of a system functioning without the presence of a legitimate defense advocate. In the end, an effective defense attorney is needed not only to avoid wrongful convictions but also to document and potentially expose why such convictions may actually occur.

It is ironic that at the very time hard evidence is being unearthed as to how dangerous the criminal justice system can be for even the innocent, popular commentators, often unencumbered by the burden of education or analysis, stridently call not only for the elimination of “proof beyond a reasonable doubt,” but also the disbarment of those attorneys who dare present their client’s defense.

#### X. LET’S SENTENCE HER FIRST AND TRY HER LATER

This phenomenon occurred during and after the 2002 San Diego murder trial of David Westerfield, who was convicted and eventually sentenced to death for the murder of his child neighbor Danielle van Dam.<sup>36</sup> The case drew a seeming firestorm of attention from some radio and television talk show hosts. There were cries for the investigation and disbarment of his counsel who had dared to question witnesses on the relevant subject as to whether the child’s parents’ alleged “swinging” sexual lifestyle might have brought predators (other than the defendant) into their home. In the end, this proved a less-than-compelling argument given the case against Westerfield, and the jury gave it the weight it deserved.<sup>37</sup> Did this eventual failure of persuasion mean that Westerfield’s attorney should have ignored a possibly, and legally permissible, exculpatory line of questioning because it offended the sensibilities of a vocal segment of the public and was intended to assist in the defense of someone against whom there appeared to be overwhelming evidence pointing to guilt?

After the Westerfield jury had returned its guilty verdict, one famed talk show host with a nationally telecast nightly program (Bill O’Reilly) actually argued that the case not only demonstrated that the Bar should discipline defense counsel for the questions he dared to raise, but also demonstrated why we must reduce the government’s burden to a “preponderance of the evidence.”<sup>38</sup> His reasoning was that even though they had found for the prosecution, the jury had taken “too long” in deliberating the nearly two-month trial.<sup>39</sup>

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<sup>36</sup> See W. William Hodes, *Seeking the Truth versus Telling the Truth at the Boundaries of the Law: Misdirection, Lying, and “Laying with an Explanation,”* 44 S. TEX. L. REV. 53, 67–69 (2002).

<sup>37</sup> See *id.*

<sup>38</sup> *The O’Reilly Factor* (Fox News Channel television broadcast Aug. 21, 2002). See also *The O’Reilly Factor* (Fox News Channel television broadcast Aug. 27, 2002).

<sup>39</sup> I appeared on the show that night with O’Reilly, reporting on the verdict from the San Diego Courthouse on behalf of the Fox News Channel (on which O’Reilly’s show airs) but never got a chance to reply to the host’s proposed justice “reform.”

Perhaps the truth that is most indigestible to many is that justice is served even by the defense of the apparently guilty. It is the presentation of a defense on behalf of those whom everyone is convinced has done it that provides the system with its truest demonstration of justice. It is also the best method for protecting the actual innocent. How else, for example, could the system be kept honest, if not for the presence of counsel for the defense? How arrogant, lazy, and dangerously convinced of their own infallibility would police, prosecutors, and courts become if defendants had no advocate? Not every government case is as compelling as that against Westerfield. Yet even here, putting the government to its proof is a truer victory for justice than would be the denial of a defense. This is a lesson often little understood even by those in power in our own government.

#### XI. GUANTÁNAMO

“It can be hard to tell whom the Bush Administration considers more of an enemy at the Guantánamo Bay detention camp: the prisoners or the lawyers,” wrote the editors of *The New York Times* on April 27, 2007.<sup>40</sup> Beginning in June 2002, the Bush Administration maintained that the President’s War Powers had given it authority, not only to indefinitely detain individuals it has described as “enemy combatants,” but also to deny these prisoners access to both the courts and to lawyers.<sup>41</sup> In December 2003, the government modified its policies by allowing detainees the opportunity to be represented by counsel; and finally in the fall of 2004, attorneys first gained access to the base.<sup>42</sup>

The animosity of the Bush administration towards the defense attorneys may have reached its peak early in 2007, when Charles D. Stimson, Deputy Assistant Secretary for Detainee Affairs, stated that corporations should consider firing any of their law firms that had provided pro bono representation to prisoners at Guantánamo. Criticism of this suggestion resulted in Stimson resigning.

The administration defends its efforts to restrict the attorney-client relationships by arguing that recognizing a right to counsel would compromise national security.<sup>43</sup> It is also possible that the administration feared actually having to charge, no less prove the guilt of, prisoners held captive for years.

In April 2007, the Justice Department requested that the Federal Appeals Court in Washington, D.C., limit the client access of hundreds of lawyers, claiming in its moving papers (with neither examples nor evidence in support) that both the attorney-client mail as well as visits had created “intractable problems and threats

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<sup>40</sup> Editorial, *After the Lawyers*, N.Y. TIMES, Apr. 27, 2007, at A26.

<sup>41</sup> See Linda Greenhouse, *Justices Weigh Opening Phase on Guantánamo*, N.Y. TIMES, Mar. 30, 2007, at A24.

<sup>42</sup> Jonathan Hafetz, *Symposium: Secret Evidence and the Courts in the Age of National Security*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 127, 146 (2006).

<sup>43</sup> Jonathan Hafetz, *Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantánamo*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 127, 146–49 (2006).

to security at Guantánamo,”<sup>44</sup> and that the lawyers had “caused unrest among the prisoners and improperly relayed messages to the news media.” Even the military Commander of Guantánamo appeared to disagree with these alleged security problems.<sup>45</sup>

Whenever I hear someone say that a particular defendant is obviously guilty and that even in the absence of sufficient admissible evidence proving guilt (or in spite of the presence of evidence pointing to innocence) they should be convicted, I am reminded of the doomed Sir Walter Raleigh in his 1603 Star Chamber trial for conspiracy of treason to (with the aid of foreign funds) dethrone King James and to put Arabella Stuart in his place. In response to Raleigh’s demand that actual witnesses to his alleged guilt be produced by the government to testify against him, Lord Cecil,<sup>46</sup> one of his judges, responded: “I marvel, Sir Walter, that you being of such experience and wit, should stand on this point, for so many horse thieves may escape [the hangman] if they may not be condemned without witnesses?”<sup>47</sup> Actual proof was, for this particular official, apparently unnecessary since the guilt of the accused was understood.<sup>48</sup>

## XII. IN DEFENSE OF THE DEFENSE OF THE DAMNED

I was not long in the profession before I realized that those who held my occupation in low esteem were not limited to a couple of retired folks with nothing better to do than concoct the existence of cabals populated by defense attorneys driven by the demonic goal of setting all murderers and robbers free to roam the streets.

*Perry Mason* has been replaced in our popular consciousness by a virtually exclusive prosecution perspective in programming.<sup>49</sup> These shows are usually told with an unwarranted pretension to reality aimed at convincing an unschooled audience that the system was created to protect the guilty and only through ingenuity and a willingness to bend the rules can a dedicated prosecutor successfully, against all odds, see criminals get their just desserts.

On the other hand, those few recent programs told from the defense point of view seem to all require comic depictions of a judicial system bordering on absurd

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<sup>44</sup> William Glaberson, *U.S. Asks Court to Limit Lawyers at Guantánamo*, N.Y. TIMES, Apr. 26, 2007, at A1.

<sup>45</sup> Bernard Hibbitts, *Guantánamo Commander Backs Away from Proposed Lawyer Visit Restrictions*, PaperChase Newsburst, May 5, 2007, <http://jurist.law.pitt.edu/paperchase/2007/05/guantanamo-commander-backs-away-from.php>.

<sup>46</sup> Contrary to popular belief, when Lord Cecil left his position at the Star Chamber he did not join the Bush Administration’s Department of Detainee Affairs.

<sup>47</sup> 2 T. HOWELL, COBBETT’S COMPLETE COLLECTION OF STATE TRIALS 18 (London 1809).

<sup>48</sup> STEPHEN VINCENT BENET, *THE DEVIL AND DANIEL WESTER*, reprinted in *THE DEVIL AND DANIEL WEBSTER AND OTHER WRITINGS* (1999) (1937).

<sup>49</sup> See, e.g., *Law and Order* (NBC television broadcast).

self-parody, showcasing the often ethically-challenged lawyers' and judges' dysfunctional personal lives.<sup>50</sup> The lessons to be gleaned from these programs are clear: these attorneys are willing and able to hoodwink jurors into acquitting a guilty client because the system, in obvious need of serious reform, is populated by morally and ethically challenged defense lawyers in desperate need of psychoanalysis.

Where has the popular media hidden the great literary images of defense lawyers such as that of Daniel Webster matched against Satan himself appearing for the prosecution, litigating for the soul of his, quite literally, "damned" client, Faustian New Hampshire Jabez Stone? In spite of what we might view as something of a conflict creating connection to the prosecutor, Stone is to be tried by a jury of the "damned." At risk of forfeiting his own immortal spirit if he should fail, counsel for the defense persuades both judge and jury to nullification and salvation (acquittal).<sup>51</sup>

If *The Devil and Daniel Webster* were to be retold today by the producers of a typical "Law and Order" show to suit their idea of contemporary sensibilities, the images of the adversaries might very well be reversed. Having sold his soul, Jabez Stone would be shown as having spent seven years earning his hellish fate. Daniel Webster would be the real devil for his attempts to persuade the jury to rule in favor of the defendant, despite the knowledge that his client had in fact sold his soul in exchange for a series of ill-gotten gains. The prosecutor would thus be more than justified in demanding eternal damnation for both.

### XIII. THE PUBLIC PERCEPTION OF THE PUBLIC DEFENDER

Branding defense lawyers with the Mark of Cain because of their vocation is far from limited to television and motion picture producers. Politicians have long since realized the advantage in identifying their opponents as soft on crime. When famed Charles Manson prosecutor and author Vincent Bugliosi turned political candidate and challenged then incumbent Los Angeles District Attorney John Van de Kamp for his office, the nastiest insult he could think of hurling at his opponent was that, before Van de Kamp had become the District Attorney, he had been a *public defender*.<sup>52</sup> "His job," proclaimed a radio commercial, "had been to put criminals back onto our streets. Do you want a man like that as your District

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<sup>50</sup> See, e.g., *Ally McBeal*, (FOX television broadcast 1997–2002), *The Practice* (ABC television broadcast), or *Boston Legal* (ABC television broadcast) (all from the mind of a single writer/producer, David E. Kelly).

<sup>51</sup> BENET, *supra* note 48.

<sup>52</sup> John Balzar, *John Van de Kamp Pleads His Own Case*, L.A. TIMES MAG., Jan. 14, 1990, at 32.

Attorney?”<sup>53</sup> Like some courtroom version of the aliens of the later science fiction film *Independence Day*, public defenders were the enemies of the justice system.<sup>54</sup>

While Van de Kamp may have survived this attack to be re-elected,<sup>55</sup> I quickly learned that in California there were actual consequences to this perceived and perhaps actual public attitude. There is, for example, one California public office few public defenders can ever hope to attain. The unwritten rule has become that for the position of judge only prosecutors need apply. Even liberal democratic governors rarely appoint public defenders to the bench for fear of public backlash in future elections. Governors are prepared to dip painfully deep into the ranks of prosecutors without ever considering the appointment, from an untapped source, of a few of the state's most qualified defenders.<sup>56</sup>

Lest you think this to be an exaggeration, well over a decade passed without a single judge appointed directly out of the 700 lawyers who daily populate the Los Angeles County Public Defender's Office.<sup>57</sup> At one point Governor Schwarzenegger “indirectly” ended the drought by making a judicial appointment in 2004 out of the smaller (100 attorneys) Los Angeles Alternate Public Defenders Office. This was the first such appointment in the twelve year history of that office. Finally, in 2005, the Governor elevated a single Los Angeles County public defender to the bench. Predictably, Schwarzenegger's choice of judges was perceived by the state's Republican Party as not having been conservative enough. As a result, the Party hierarchy protested and demanded the appointment of more Republicans (presumably of a more appropriate “Law and Order” predilection).<sup>58</sup>

#### XIV. BETWEEN THE ANGELS AND THE APES

None of what I have been saying, however, is an attempt to suggest that the defense bar, so long as dedicated and hard working, always does the right thing. Defenders suffer from the same multitude of failings as that of the general population of trial lawyers.

I would only suggest that defense attorneys are no more infected by the seven deadly sins than is the remainder of the public. One character flaw that those of

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<sup>53</sup> Taken from a radio ad on file in the recesses of my memory. I specifically remember being stopped at the traffic light on the corner of Little Santa Monica Boulevard and Wilshire Boulevard in Los Angeles County, in my 1973 Firebird—white with a blue vinyl top—when I first heard the ad.

<sup>54</sup> See also VINCENT BUGLIOSI, *OUTRAGE: THE FIVE REASONS WHY O.J. SIMPSON GOT AWAY WITH MURDER* (1996).

<sup>55</sup> Balzar, *supra* note 52, at 32.

<sup>56</sup> See Dan Morain, *Ruling May Force '3 Strikes' Backers to Dilute Law*, L.A. TIMES, June 26, 1996, at A14; Leslie Abramson, *The Appearance of Justice: Juries, Judges and the Media*, 86 J. CRIM. L. & CRIMINOLOGY 1096, 1100 (1996).

<sup>57</sup> Interview with Robert E. Kalunian, Chief Trial Deputy, Records of the Office of the Los Angeles County Public Defenders (May 2004).

<sup>58</sup> See Roberts Salladay, *Gov's Allies Upset at Enemy Within: Republicans Say Too Many People Outside the Party are Being Appointed to Office*, L.A. TIMES, Apr. 14, 2006, at B1.

the criminal bar are overly estimated to possess is greed. Many in the public identify avarice, along with other antisocial tendencies, as the only logical motivation for a life, or even a trial, spent defending someone who is more than likely guilty. The populace seems to identify the bulk of the defense bar with a small group of celebrity lawyers, some but not all of whom have grown wealthy in defense of the damned. Yet, I believe few of even those representing high-profile defendants began their careers with riches as their primary goal or even a likely prospect.

Over ninety percent of all felony defendants are represented by government appointed counsel.<sup>59</sup> If the amassing of wealth were their goal, these lawyers certainly made a bewildering career choice. The vast majority of public defenders and private defense attorneys, like their prosecutorial counterparts, will never enter the ranks of the rich and famous. These advocates, who are subjected daily to the law's delay and the insolence of office, often do so for pay below that of a respectable longshoreman. Thus, greed would not seem their endemic motivation. When considering today's astronomical cost of obtaining a legal education, one is reminded of G. B. Shaw's General Burgoyne. When accused of being a mercenary, he responded: "If you knew what my commission cost me, and what my pay is, you would think better of me."<sup>60</sup>

#### XV. EPILOGUE

The public perception of the flaws in the criminal justice system has only grown worse since those days I first wandered the courthouse hallways. If anything, the assault upon the citadel of the right to counsel is coming in these days ever more apace. The Patriot Act limits access to counsel for some of those accused, while prisoners kept at Guantánamo Bay initially existed in a "lawyer-free zone." I find myself asked more and more frequently by my students: "How can you justify having represented obviously guilty people?" Simply retorting that Abe Lincoln himself was a defense attorney does not seem to work. The pity is that in this era of sound bites, there is no short easily communicated justification for how I chose to spend my life. This essay is as close as I can come to a response. Perhaps in the end the best defense of the defense is simply to envision what life would be like in a universe governed by a judicial system administered exclusively by police and prosecutors, and restrained only by judges who, often themselves subject to re-election campaigns, have been appointed by politicians often seeking jingoistic campaign issues to use against or to protect themselves

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<sup>59</sup> See Jim Neuhard, *Free Counsel, A Right Not a Charity*, 14 N.Y.U. REV. L. & SOC. CHANGE 101, 109 (1986).

<sup>60</sup> GEORGE BERNARD SHAW, *THE DEVIL'S DISCIPLE* 55-56 (Players Press 1991).



from potential opponents. Given such a reality, even the court-watchers might soon grow bored and perhaps just a little bit concerned.<sup>61</sup>

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<sup>61</sup> See Stanley A. Goldman, *First Thing We Do, Let's Kill All the [Defense] Lawyers*, 30 LOY. L.A. L. REV. 1, 4 (1996).

